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IN THE

Supreme Court of the United States

OCTOBER, 1970 TERM

No. 784

ABERDEEN CABLE TV SERVICE, INC., WALTER A. BROWN AND STACY B. BROWN,

Petitioners,

v.

CITY OF ABERDEEN, SOUTH DAKOTA, A MUNICIPAL CORPORATION, J. CLIFTON HURLBERT, AS MAYOR AND MEMBER OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, FRED GERDES, HALE INMAN, AL DONAHUE AND BILL COESTER, AS MEMBERS OF THE CITY COMMISSION OF THE CITY OF ABERDEEN, WINFRED KRAFT, AS CITY AUDITOR OF THE CITY OF ABERDEEN, SOUTH DAKOTA TELEVISION, INC. AND TV SIGNAL COMPANY OF ABERDEEN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of South Dakota and the Circuit Court in and for Brown County, Fifth Judicial Circuit, South Dakota

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the South Dakota Circuit Court, 5th Judicial Circuit, is not officially reported but a copy thereof is included as Appendix I to the Petition for Certiorari. The opinion of the South Dakota Supreme Court is reported at 176 N.W. 2d 738.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The question presented for review is whether the Supreme Court of South Dakota, in construing SDC 1939 45.1006 (now found in Chapter 9-35 of the *South Dakota Compiled Laws* of 1967) and particularly the term "public utility" as contained therein, violated Petitioners' rights under the First, Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATION INVOLVED

The pertinent Constitutional provisions, statutes and regulation involved are set forth in the Petition at pp. 3-6.

STATEMENT

On August 12, 1968, the Aberdeen City Commission enacted Ordinance No. 1187-Amended, granting Aberdeen Cable TV Service, Inc. a franchise to use the streets and alleys for the purpose of constructing and operating a CATV system. The Ordinance was referred to the electors of the City and was rejected at public referendum. Shortly after the referendum, Petitioners instituted two law suits in the Circuit Court, 5th Judicial Circuit, of the State of South Dakota seeking a declaratory judgment and contesting the referendum held on Ordinance No. 1187-Amended.

The Circuit Court held that Aberdeen Cable TV Service, Inc. was not a public utility and that Ordinance No. 1187-Amended was in full force and effect as it did not have to be submitted to a vote of the electors pursuant to SDC 1939 45.1006.

On appeal, the sole issue considered by the Supreme Court of South Dakota was whether the Ordinance required submission to a vote of the electors before it could become effective. The Supreme Court reversed the decision of the Circuit Court and held that a CATV system was a public utility and, therefore, that Petitioners were required to submit their ordinance to public referendum in accordance with SDC 1939 45.1006. As Aberdeen Cable TV Service, Inc. had not satisfied the referendum requirement, the Supreme Court of South Dakota held that Ordinance No. 1187-Amended was void and ineffective.

From the South Dakota Supreme Court's judgment, and its subsequent denial of Petitioners' request for rehearing, the Petition for Writ of Certiorari was filed with this Court.

ARGUMENT

I.

PETITIONERS HAVE WAIVED THE FEDERAL QUESTIONS AND SHOULD NOT NOW BE PERMITTED TO SEEK CERTIORARI REVIEW BY THIS COURT

It is essential that a substantial federal question be properly raised in the state court proceedings if the Supreme Court of the United States is to have certiorari

jurisdiction over a state court decision. The federal question must have been presented to the state court with particularity, *Oxley Stove Co. v. Butler County*, 166 U.S. 648, 655 (1897), and at the proper point in the state court proceeding, *Godchaux Co. v. Estoptnal*, 251 U.S. 179, 818 (1919).

Timely raising of the federal question is itself a matter of state procedure; failure to comply therewith has generally proved a bar to Supreme Court review. *In re Lamkin*, 355 U.S. 59 (1957); *see also Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1903). Specifically, it has been held that where a federal question was not raised in trial court as required under state law, but was raised for the first time in a petition for rehearing addressed to the highest court, denial of the petition for rehearing without opinion precluded review on certiorari by the Supreme Court. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-4 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1934); *see also Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 326, 333-4 (1912). To a similar effect, the federal issue will be deemed to have been waived where the litigant failed to list the federal question among the "assignment of errors" in the brief filed with the state supreme court, or to argue that matter in the brief. *Beck v. Washington*, 369 U.S. 541, 553 (1962).

Petitioners herein have failed in every respect to timely raise the supposed federal issues during the state proceedings. The federal questions asserted by Petitioners were neither raised before the Circuit Court nor included in Petitioners' assignment of errors (or brief) to the State Supreme Court on appeal. In fact, contrary to Petitioners' statement that the federal questions were first raised by

the South Dakota Supreme Court in its Opinion[1] and subsequently pursued by Petitioners in petitioning that court for rehearing, it was not until after final judgment and after denial of their petition for rehearing that Petitioners, in their second request for rehearing and for recall of remittitur, first raised before the South Dakota Supreme Court the federal questions now in issue. In view of *State v. Williams*, 173 N.W. 2d 889 (1970) which holds that under South Dakota law federal questions cannot be raised for the first time on appeal [*see also Tri-State Auto Auction v. Ostroot*, 78 N.W. 2d 468 (1956), and *Milbank v. N.D. Tel. Co.*, 159 N.W. 99 (1916)], Petitioners must as a matter of law be deemed to have waived the federal issues and should not now be permitted to invoke this Court's certiorari jurisdiction based upon an afterthought of unsuccessful state court litigation.

II.

NO CONSTITUTIONAL QUESTIONS ARE PRESENTED

Should the Court reject the arguments contained in the preceding section, Respondent respectfully submits that

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[1] The court's only reference to federally protected rights appeared in a single sentence of its opinion where it noted, as a general proposition, that legislative classification of a company as a public utility might, under some circumstances, be rendered void by virtue of the guaranties of the Constitution of the United States. This passing reference was not at all directed to Petitioners' rights or the effect of application of SDC 1939 45.1006 to them, and cannot be considered as having drawn in question the federal issues asserted by Petitioners herein. *See Black v. Cutler Laboratories* 351 U.S. 292, 297-8 (1956).

no substantial federal questions warranting assertion of certiorari jurisdiction are presented by the Petition for Writ of Certiorari.

A. The Supreme Court of South Dakota Legitimately Construed the Term "Public Utility" as Used in SDC 1939 45.1006

Petitioners do not challenge the constitutionality of SDC 1939 45.1006 itself, which requires public election as a condition precedent to issuance to a public utility of a franchise for use of public streets. They challenge instead the South Dakota Supreme Court's construction of the term "public utility" as employed in that statute, and argue that if CATV in South Dakota is to be treated as a public utility, therefore subject to the election requirement of SDC 1939 45.1006, this must be accomplished by legislative act, not judicial decision.

It is well recognized that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislature, has said." *United States v. American Trucking Associations*, 310 U.S. 534, 544 (1940).

The law concerning state regulation of public utilities is in accord. The question of whether a particular company or service is a public utility does not depend upon legislative definition, but on the nature of the business or service rendered. *State Public Utility Commission v. Monarch Refrigerating Company*, 108 N.E. 716 (1915). The determination of public utility status cannot be accomplished by mere legislative fiat or regulatory order,

Clear Creek Oil and Gas Co. v. Ft. Smith Spelter Co., 230 S.W. 897 (1921); *Inland Empire Rural Electrification v. Department of Public Service of Washington*, 92 P.2d 258 (1939); it is instead a judicial question which must be determined by a court of competent jurisdiction. *Natatorium Co. v. Erb*, 200 P.348, 350 (1921); *Clarksburg Light and Heat Co. v. Public Service Commission*, 100 S.E. 551, 553 (1919).

Petitioners distort the matter by stating that the South Dakota Supreme Court has declared, *"although no statutory determination had been made by the South Dakota Legislature*, that a CATV system is a public utility requiring a public utility election under SDC 1939 45.1006 . . . ." (Emphasis added) The election requirement of SDC 1939 45.1006 is solely a creation of the South Dakota Legislature, not the State Supreme Court. In determining that Petitioners were a "public utility" under the terms of that statute, and therefore subject to the election requirement, the South Dakota Supreme Court sought merely to interpret the applicability to CATV of an existing law – not to declare new public utility regulation.

The fact that CATV was not expressly recognized as a public utility at the time of enactment of the statute does not prevent the South Dakota Court from holding that CATV systems, including Petitioners, were subject at all times to the statute's requirements. Indeed, the absence of any enumeration in the statute of what businesses or services constitute public utilities, or what public utilities are covered thereby, imposes upon the judiciary the responsibility for construction of the term and determination of whether CATV is a public utility subject to the requirements of the statute. For, "if Congress [the legislature] has made a choice of language which thoroughly

brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislature." *Barr v. United States*, 324 U.S. 83, 90 (1945); *see also Amity Fabrics v. United States*, 305 F.2d 4, 9 (Cust. Ct., 2d Div. 1969). [2]

Finally, although other state courts may have held that CATV is not, under the laws of those states, a public utility, the Supreme Court of South Dakota was not bound to follow those cases in determining whether CATV was, *within the meaning of SDC 1939 45.1006*, a "public utility." Nevertheless, the actual decision of the State Court is unimportant for purposes of determining certiorari jurisdiction; what is significant is the question whether the court had the power to construe the term of the statute and whether its construction thereof violated Petitioners' constitutionally protected rights. We believe that the foregoing demonstrates that the South Dakota court was entitled – indeed obliged – to construe the term "public utility," as employed in SDC 1939 45.1006, and that the court acted well within its powers in holding that Petitioners were subject to the election requirement of that statute.

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[2] *See Browder v. United States*, 312 U.S. 335, 339-340 (1941).

B. The South Dakota Supreme Court's Decision Holding Petitioners Subject to the Requirements of SDC 1939 45.1006 Did Not Infringe Upon Petitioners' Rights Under the First Amendment

If Petitioners' grievance be that their First Amendment rights are, by virtue of their being made subject to SDC 1939 45.1006, unconstitutionally restricted, the Petitioners' attack here is misplaced. The requirement that public utilities submit to public referendum is a matter of statute; the state court merely sought to determine whether the Legislature intended that Petitioners be subject to that requirement. We demonstrate that the South Dakota Supreme Court's construction of "public utility" as applicable to Petitioners does not result in any unreasonable restraint on the exercise of Petitioners' First Amendment rights.

Although governmental restrictions imposed upon the exercise of free speech for the purpose of suppressing views and opinions clearly contravene the First Amendment, reasonable limitations directed to the preservation of a community interest are constitutional. *See, e.g., Feiner v. New York*, 340 U.S. 315 (1951); *Kovacs v. Cooper*, 336 U.S. 77 (1949); and *Cox v. New Hampshire*, 312 U.S. 569 (1941), all upholding a municipality's right to condition, or even restrict, access to the streets for exercise of First Amendment rights where a community interest would otherwise be jeopardized. A similar community interest supports the legitimacy of public utility regulation. The constitutionality of such regulation has uniformly been upheld on the ground that state regulation of public utilities, and their use and control of scarce resources indispensable to the public, constitutes

reasonable exercise of the police power of the state in furtherance of the general health and welfare. *See, e.g., State ex rel Utilities Commission v. Lumbee Electric Membership Corp.*, 166 S.E.2d 663 (1969); *Commonwealth Tel. Co. v. Carley*, 213 N.W. 469 (1927); *Motor Transit Co. v. Railroad Comm. of Calif.*, 209 P. 586 (1922); *State v. Holm*, 64 N.W. 989 (1917).

The regulation of public utilities' (CATV's) use of the scarce resource of public streets here is designed to protect the community from the disruptive effects which unrestrained and excessive construction of public utility facilities (including CATV distribution facilities) may have. The regulation here is, in many respects, analagous to the regulation upheld by this Court in *National Broadcasting Company v. United States*, 319 U.S. 190 (1943), where rules of the Federal Communications Commission requiring broadcasters to secure a license as a condition to use of the airwaves were held reasonable restrictions on access not in violation of First Amendment rights. Here, as there, no restriction is imposed upon actual exercise of the right; rather, reasonable conditions have been imposed on access to the indispensable resource to assure that the community at large is not prejudiced by the unrestrained exhaustion of that scarce public resource. Indeed, as Justice Frankfurter noted in speaking for the Court, such regulation does not hinder, but rather ultimately fosters the exercise of First Amendment rights by providing for the orderly use of scarce public resources upon which the exercise of these rights depends. 319 U.S. at 226-7. Viewed in this light, Petitioner's argument of First Amendment infringement is meritless and should be rejected by this Court.

C. Application of SDC 1939 45.1006 to Petitioners Did Not Violate Their Fifth Amendment Rights

Petitioners further contend that, should the Supreme Court of South Dakota be empowered to construe the meaning of "public utility" as including CATV, it should rule prospectively, for application of the election requirement of SDC 1939 45.1006 to Petitioners would jeopardize their business investments and thereby infringe upon property rights protected under the Fifth Amendment.

Initially, we note that application of SDC 1939 45.1006 to Petitioners does not constitute an unlawful taking of property under the Fifth Amendment. Petitioners are required by SDC 1939 45.1006 merely to obtain voter approval of the Ordinance granted to them by the City of Aberdeen; upon having done so, Petitioners will be free to commence CATV services and their business investment will remain secure.

Moreover, while it is generally thought that legislatures should not engage in retroactive regulation, statutory construction by the courts is of a different nature. The legislature, in enacting a statute, creates new law; retroactive regulation might, in some instances, violate the "fairness" principles of the Fifth Amendment. Courts, however, do not engage in the creation of new law but, rather, the construction of existing law.

"Old laws apply to changed situations. The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms. While a statute speaks from its enactment, even a ciminal statute embraces everything which subsequently falls within

its scope." *Browder v. United States*, 312 U.S. 335, 339-340 (1941).

Thus, SDC 1939 45.1006 has been in effect throughout the course of all events relevant herein. Once the Court construed CATV to be in the nature of a public utility, Petitioners must be viewed as having been a public utility throughout the course of these events and, therefore, subject to the public referendum requirement. There is no constitutional right to the grandfather rights which Petitioners seek, and there is no constitutional infringement when a court merely applies to a party a rule which has been in effect at all relevant times, but to which the party contends he was not subject.

D. The Supreme Court of South Dakota Rendered Its Decision on an Independent Non-Federal Ground

This Court has uniformly held that it will not review a state court judgment based upon an adequate and independent non-federal ground, even when a federal question is involved and is perhaps wrongly decided. *Murdock v. Memphis*, 20 Wall. 590, 636 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935). Thus, where the federal question is discussed only by passing reference or in certain broad statements in the state supreme court's opinion which are not essential to the court's judgment on state grounds, this Court has in the past declined jurisdiction [*see*, *Black v. Cutler Laboratories*, 351 U.S. 292, 297-298 (1956); *Herb v. Pitcairn*, 324 U.S. 117, 125, 126 (1945)], stating "we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. *Herb v. Pitcairn, supra; Williams v.*

Kaiser, 323 U.S. 471, 477." *Black v. Cutler Laboratories*, 351 U.S. 292, 297-298 (1956).

It is apparent that no federal questions were timely raised before or considered by the Supreme Court of South Dakota, and that the court rendered its opinion based upon adequate independent non-federal grounds. Indeed, the court did nothing more than determine, on the basis of South Dakota law, the applicability of a state statute to Petitioners, a construction not involving federal laws or affecting federally protected rights. As no federal rights were adjudicated by the court, and as the court was entitled to consider as waived any federal questions presented by Petitioners in their request for stay, we respectfully submit that this Court should consider itself to lack jurisdiction to review the judgment of the South Dakota Supreme Court on certiorari.

CONCLUSION

Petitioners have failed to satisfy the jurisdictional requirement of timely drawing in question the federal issues upon which they urge this Court to base certiorari jurisdiction. Moreover, Petitioners have not presented any compelling arguments demonstrating the existence of federal questions or the need for consideration of this matter by this Court. Accordingly, Respondent TV Signal Company of Aberdeen respectfully submits that the Petition for Certiorari should be denied.

Respectfully submitted,

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October 30, 1970